United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2068

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WAYNE CARLSON,
Plaintiff-Appellant

v.

R. KENT STONEMAN, Commissioner of Corrections for the State of Vermont, PAUL DAVALLOU, Warden, Vermont State Penitentiary, JULIUS MOEYKENS, Warden, Vermont State Penitentiary, THREE UNKNOWN CORRECTIONAL OFFICERS, acting in their capacities as Corrections Officers at the Vermont State Penitentiary,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

Periodicals

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I. STATEMENT OF THE ISSUES

1. Appellant contends that the trial court erred in holding that the hearing procedure provided Appellant incident to out-of-state incarceration, which procedure allowed for the prison warden to act as the hearing officer, did not violate Appellant's rights to a fair and impartial hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Appellant contends that the trial court erred in holding that Appellant was not denied equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution when Appellant was not provided the opportunity for an independent hearing officer and legal counsel at the hearing provided by Appellees to contest the

out-of-state incarceration of Appellant which resulted from alleged activity by Appellant which could have been and was the subject of criminal prosecution in the State of Vermont.

II. STATEMENT OF THE CASE

Appellant Wayne Carlson (hereinafter referred to as inmate Carlson) on or about September 4, 1974, filed a pro se civil rights action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1343, 2201 and 2202 with the United States District Court for the District of Vermont to contest the constitutionality of his out-of-state incarceration in the federal prison system. (Appendix p. 1 - 13) On September 4, 1974, inmate Carlson was assigned counsel by the Vermont District Court. (Appendix p. 14) Inmate Carlson, through counsel filed a motion for return of inmate Carlson during the pendency of this action (Appendix p. 15 - 16) and a memorandum in support of Appellant's request for return to Vermont during pendency of action. (Appendix p. 17 - 29) This motion was denied by the Court, and a trial date was set for December 17, 1974, with an agreement from Appellees that inmate Carlson would be returned to Vermont prior to the trial date. On or about October 22, 1974, Defendants-Appellees filed an answer to the pro se complaint. (Appendix p. 30 - 34) On or about December 9, 1974, inmate Carlson was returned to Vermont and lodged at Windsor Prison. On or about December 11, 1974, inmate Carlson filed an amended complaint and accompanying paperwork. (Appendix p. 35 - 43)

Defendants-Appellees filed an answer to this amended complaint. (Appendix p. 44 - 48) The Court allowed the amended complaint (Appendix p. 35 - 43), on December 17, 1974. (Transcript p. 4) Trial of the case commenced before Judge Coffrin December 17, 1974, and was completed December 18, 1974. A legal memorandum in support of inmate Carlson's claim was filed on December 23, 1974, (Appendix p. 49 - 66) and the Defendants-Appellees responded with memoranda. On or about January 24, 1975, the District Court issued an opinion and order denying inmate Carlson's application for a preliminary and permanent injunction and other requested relief. (Appendix p. 111 - 137) Inmate Carlson pursuant to Rule 59(a) of the Federal Rules of Civil Procedure filed a motion for rehearing. (Appendix p. 138 - 140) The Court on March 13, 1975, denied Carlson notice for rehearing, (Appendix p. 141 - 149) and this appeal followed. (Appendix p. 150)

III. STATEMENT OF THE FACTS

On March 14, 1974, Appellant Wayne Carlson was involuntarily transferred from the Windsor Prison located in Windsor, Vermont, to the Federal Prison located at Lewisburg, Pennsylvania. (Appendix p. 116)

On March 11, 1974, inmate Carlson escaped from the Windsor Prison with another inmate, Anthony Tanzi (Appendix p. 112 - 113) Upon notification of the escape, Appellee Moeykens, the warden of Windsor Prison, notified various persons including

Appellee Vermont Commissioner of Corrections Stoneman's office and the appropriate state's attorney's office (Transcript p. 132) Upon the two escaped inmates' return after capture, the Warden met the car carrying inmate Carlson, participated physically in the return of inmate Carlson to the prison and had a short, heated conversation with inmate Carlson. (Transcript p. 19, 109, 130, 131)

Inmate Carlson was taken to the Guard Room area of the prison where the Warden was present for a period of time while inmate Carlson was searched prior to his being placed in punitive segregation at the prison. (Transcript p. 20) The Warden contacted his superiors in Montpelier, Vermont, to inform them of the recapture of inmate Carlson and either then or later that day of March 11, 1974, was informed that the decision had been made to transfer inmate Carlson to the federal prison system. (Transcript p. 134, 136) The Warden on March 11, 1974, contacted Lewisburg Federal Prison to arrange for the arrival of inmate Carlson at that federal prison. (Transcript p. 137)

On the afternoon of March 11, 1974, the warden then went to investigate the escape and to quote his testimony:

> "Immediately following the apprehension, I [Warden Moeykens] was directed by the Commissioner to commence immediately an investigation into the facts surrounding the escape, and as a result, that afternoon Mr. Abbott and I spent the entire afternoon interviewing." (Transcript p. 156)

On the 11th and 12th of March the Warden and his superiors consulted and reviewed inmate Carlson's record and discussed his transfer to a federal prison, and based on the Warden's knowledge,

the Warden prior to March 13, 1974, concurred with the Department's decision to transfer inmate Carlson. (Transcript p. 147)

On the afternoon of March 11, 1974, the Warden went to the punitive segregation area of Windsor Prison and orally informed inmate Carlson that he was going to be transferred to Lewisburg Federal Prison. (Transcript p. 21, 22, 110, 120, 137, 157) The Warden and inmate Carlson entered into a heated exchange upon inmate Carlson's receipt of this information. (Transcript p. 21, 22, 111, 120, 121, 137, 138)

On March 12, 1974, inmate Carlson was given written notice of a proposed hearing by the Warden to be held March 13, 1974, prepared and signed by the Warden. (Transcript p. 143, 144, Appendix p. 67 - 68) Because of pending criminal charges and the strong likelihood of federal criminal charges as a result of the March 11, 1974, escape inmate Carlson requested and received permission to contact counsel, did so and was advised by counsel to sign nothing and say nothing at the hearing scheduled for the 13th of March, 1974. (Transcript p. 23, Appendix p. 70) Inmate Carlson was advised by counsel to request the presence and assistance of legal counsel at the scheduled hearing. (Appendix p. 70) On March 12, 1974, the Warden continued to review inmate Carlson's case. (Transcript p. 147)

Sometime during this period of time the Warden also referred the escape of inmate Carlson to the local state's attorney for action of any criminal charges. (Transcript p. 153)

As a result of advice of legal counsel and because of the wording of the transfer notice, inmate Carlson did not sign

the notice. (Transcript p. 25)

On March 13, 1975, a personal conference (Transcript p. 1974) was held between inmate Carlson and the Warden. (Appendix p. 69 - 78) At this personal conference the Warden informed inmate Carlson that the Warden did not, in his opinion, have to provide any type of conference or hearing. (Appendix p. 72)

Shortly after this personal conference on March 13, 1974, inmate Carlson was given a notice of decision signed by the Appellee Warden Moeykens providing for inmate Carlson's transfer to the federal prison system. (Appendix p. 80 - 81)

Prior to this series of events which occurred on March 11, 1974, through March 13, 1974, inmate Carlson and the Warden had continuing contact and interaction. This contact began shortly after inmate Carlson's incarceration at Windsor Prison in May of 1973. (Transcript p. 17, 125) In early June of 1973 inmate Carlson was subjected to a classification procedure which was suspended by the Warden. (Transcript p. 41 - 43, 126, 127, 191 - 195) Between this period of June 1973 and March 1974 inmate Carlson saw the Warden approximately once a week and had conversations, including heated conversations, with him. (Transcript p. 40, 115)

During inmate Carlson's incarceration at Windsor Prison he was subjected to several disciplinary hearings the results of which were reviewed by the Warden. (Transcript p. 152) During inmate Carlson's incarceration at Windsor Prison, the Warden had access to inmate Carlson's personnel file. (Trans-

cript p. 143) On several occasions the Warden referred inmate Carlson to the local state's attorney for criminal action. (Transcript p. 153) In January of 1974 the Warden testified against inmate Carlson at a probable cause hearing incident to a criminal charge on January 28, 1974, and at a criminal trial on January 30 and 31. (Transcript p. 140)

It should also be noted that during inmate Carlson's incarceration at Windsor Prison the population at the prison was between 90 and 100 inmates. (Transcript p. 150)

Inmate Tanzi who participated in the escape with inmate Carlson was not involuntarily transferred to the federal prison system as a result of the escape. (Transcript p. 113 - 115, 151) Tanzi was provided a disciplinary hearing at which he was represented by legal counsel, and was afforded prior notice of the charges, a hearing officer other than the warden, presentation of witnesses against him, confrontation and cross-examination of the witnesses and opportunity to present favorable witnesses. The use of an independent hearing officer and the representation by legal counsel were authorized by Departmental policy whenever the subject of the hearing was activity which had been or would be referred to the state's attorney for criminal prosecution. (Transcript p. 113 - 115, 158, Appendix p. 82 - 86) Inmate Tanzi was also criminally charged as a result of the escape. (Transcript p. 114, Appendix p. 116)

Inmate Carlson was transferred for the same infraction of the internal disciplinary rules of the prison for which Tanzi was disciplined. (Transcript p. 113, 139)

As a result of the personal conference between inmate Carlson and the Warden on March 13, 1974, inmate Carlson was transferred to the federal prison system at Lewisburg and subsequently transferred from there to the federal prisons located at Terre Haute and Marion. (Appendix p. 116)

IV. ARGUMENT

A. APPELLANT CONTENDS THAT THE TRIAL COURT ERRED IN HOLDING THAT THE HEARING PROCEDURE PROVIDED APPELLANT INCIDENT TO OUT-OF-STATE INCARCERATION, WHICH PROCEDURE ALLOWED FOR THE PRISON WARDEN TO ACT AS THE HEARING OFFICER, DID NOT VIOLATE APPELLANT'S RIGHTS TO A FAIR AND IMPARTIAL HEARING AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. The evidence at trial clearly established that Appellant suffered substantial losses as a result of involuntary transfer to the federal prison system.

On March 13, 1975, at a "personal conference" before the Appellee Warden of the Windsor Prison the previous decision of the Warden and his superiors to transfer inmate Carlson to the federal prison system for incarceration was affirmed. (Appendix p. 80, 81) This "personal conference" was conducted pursuant to Vermont Department of Corrections policy which provided

for the superintendent of the facility at which the proposed transferee was incarcerated to conduct a hearing prior to out-of-state incarceration. (Appendix p. 102 - 104)

Inmate Carlson contended at the hearing in this case before the District Court that as a result of the involuntary incarceration in the federal prison system at federal prisons in Lewisburg, Terre Haute and Marion he suffered certain losses, and that these losses required the Vermont Department of Corrections to provide him due process incident to his federal incarceration, as provided by the Fourteenth Amendment to the United States Constitution. It should also be noted that regardless of the loss suffered, the Vermont Department of Corrections afforded by policy a "hearing" to allegedly contest the out-of-state incarceration. (Appendix p. 102 - 104) The trial Court found that only a bare minimum of procedure would have been constitutionally sufficient to safeguard inmate Carlson's rights. (Appendix p. 124)

Inmate Carlson contends that the Trial Court erred in finding that he suffered little or no loss as a result of the out-of-state incarceration.

At the trial uncontradicted testimony by Carlson was introduced showing the losses that he suffered. Inmate Carlson testified that as a result of federal incarceration personal grooming and clothing was more severely restricted in the federal system, (Transcript p. 99); that he was denied access to legal counsel representing him on pending State of Vermont

criminal actions, (Transcript p. 37, 95); that he was branded an informer eventually requiring protective custody in administrative segregation to insure his safety because he was a state prisoner in the federal system, (Transcript p. 34 - 36, 43, 103); that he lost items of personal property and did make an effort to recover said property, (Transcript p. 28, 29, 36, 77); that visits from friends that he had received at Windsor Prison on a weekly basis ceased, (Transcript p. 38, 97); that his use of a telephone for social calls was severely restricted as a result of the transfer, (Transcript p. 38); that he was denied the opportunity or right to correspond with friends and was required to have an approved mailing list, (Transcript p. 94, 231); that a portion of the records that accompanied him were erroneous, (Transcript p. 100); also, for all purposes except length of sentence inmate Carlson was to be treated in all ways as a federal prisoner pursuant to the contract between Vermont and the United States Bureau of Prisons. (Transcript p. 107, Plaintiff's Exhibit No. 4)

The Trial Court found that more programs and activities may have been available to inmate Carlson along with greater freedom of movement in the federal prison at Lewisburg. (Appendix p. 122) Inmate Carlson did not and does not contest these points. Inmate Carlson does contest that he suffered substantial losses as testified to including the loss of visits, threats to his well-being, mail restrictions, and counsel access.

There is no question that procedural due process must be afforded a person who suffers "grievous loss." See Joint Anti-

Facist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 674, 95 L.Ed. 819 (1951) (Frankfurter J. concurring); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 987 (1969); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

2. Involuntary out-of-state incarceration requires due process safeguards.

The general effect of transfers on the transferred inmates was described in Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973), judgment vacated, ____ U.S. _____, 94 S.Ct. 3200, 41 L.Ed.2d 1155 (1974) and remanded to the Court of Appeals for the First Circuit for further consideration in light of Wolff v. McDonnell [supra] reissued 510 F.2d 538 (1st Cir. 1974) where the Court found that:

> "Wholly apart from the specifics of this case we think it well-recognized that transfer characteristically entails inconveniences and privations. Some arise by the distance factor alone increasing the difficulty of communication and visitation. See Capitan v. Culp, 356 F.Supp. 302 (D. Or. 1972) Other disadvantages stem from the breaking off of established programs, both educational and rehabilitation and orientation to a new setting, programs, rules and companions. Still other privations exist by reasons of the administrative requirements of the receiving prison. New inmates must often be subjected to 'administrative' isolation pending examination, classification and integration into a new prison community. Although the reason for this segregation may be distinguished from the reason for punitive segregation, the impact upon the inmate is no less. Finally, if the fact of transfer noted on an inmate's record without further explanation connotes 'troublemaker,' the inmate may be faced with recurrent, unfavorable dispositions as to the status within the

prison and might eventually suffer an unfavorable parole decision, resulting in a longer term adverse alteration of the inmate's living conditions."
490 F.2d at 1213

One of the essential elements of due process that the courts have required is the necessity that the person whose rights are being effected be given the opportunity to present his case to an impartial hearing officer or decisionmaker. See Morrissey v. Brewer, supra at 489; Gagnon v. Scarpelli, supra; at page 782, and Wolff v. McDonnell, supra, 41 L.Ed.2d at 959.

Involuntary interstate transfer of prison inmates has been extensively litigated in recent years, and the courts have found that procedural due process attaches to involuntary transfer because of the loss suffered by the transferred inmates. See Gomes v. Travisono, supra; Hoitt v. Vitek, 361 F.Supp. 1238, (D. N.H. 1973) appealled on other grounds 495 F.2d 219 (1st Cir. 1974) 497 F.2d 598 (1st Cir. 1974); Ault v. Holmes, 369 F.Supp. 288 (W.D. Ky. 1973) vacated in part and remanded 506 F.2d 288 (6th Cir. 1974); Stone v. Egeler, 377 F.Supp. 115 (W.D. Mich. 1974) affirmed with modifications 506 F.2d 287 (6th Cir. 1974); Croom v. Manson, 367 F.Supp. 586 (D. Conn. 1973); Barrett v. Boone, _____ F.Supp. _____ (D. Mass. 1973); Capitan v. Culp, 356 F.Supp. 302 (D. Or. 1973); Kessler v. Culp, 372 F.Supp. 76 (D. Or. 1973); Park v. Thompson, 356 F.Supp. 783 (D. Ha. 1973); Robbins v. Kleindienst, 383 F.Supp. 239 (D.C. D.C. 1974); Clonce v. Richardson, 379 F.Supp. 338 (W.D. Mo. 1974); Walker v. Hughes, 375 F.Supp. 708 (E.D. Mich. 1974); further opinion 386 F.Supp. 32 (E.D. Mich. 1974).

Intrastate and other transfer situations have also been extensively litigated recently with courts finding that sufficient loss occurred to require that due process be afforded incident to the transfer. See generally Newkirk v. Butler, 364 F.Supp. 497 (S.D. N.Y. 1973), modified 499 F.2d 1214 (2nd Cir. 1974), appeal pending ____ U.S. _____ 95 S.Ct. 172, 42 L.Ed.2d 138 (1974) (intrastate involuntary transfer of prison inmate); U.S. ex rel. Haymes v. Montanye, 505 F.2d 977 (2nd Cir. 1974) (intrastate involuntary prison transfer); Bowers v. Smith, 353 F.Supp. 1339 (D. Vt. 1972) (intraprison transfer); Aikens v. Lash, 371 F.Supp. 482 (D.C. N. Ind. 1974), modified in part in light of Wolff v. McDonnell, supra, ____F.2d _____ 17 Cr. L.Rptr. 2073 (7th Cir. 1975) (intrastate involuntary transfer); Romero v. Schauer, 386 F.Supp. 851 (D. Col. 1974) (transfer from State Hospital to State Prison); White v. Gillman, 360 F.Supp. 64 (S.D. Ia. 1973) (involuntary intrastate prison transfer).

3. Involuntary out-of-state incarceration requires due process safeguards including an impartial hearing officer.

In determining what process must be provided incident to involuntary transfers, the courts have followed the mandates of Morrissey v. Brewer, supra, that the transferee be provided an impartial hearing officer or board.

This Circuit in Newkirk v. Butler, supra, upheld the lower court holding reported at 364 F.Supp. 497 (S.D. N.Y. 1973) where it was stated that the transferee should be allowed to present

his case before a "relatively impartial tribunal." 364 F.Supp. 497 at 503.

In U.S. ex rel. Haymes v. Montayne, supra, this Court, while finding that certain types of interstate transfer may not require a hearing, went on to state:

> "Transfer intended as punishment, however, presents a situation wholly different from the administrative removal of an inmate to another facility. When harsh treatment is meted out to reprimand, deter or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. While some discretion may be appropriate in an administrative determination of the need to avoid violence and unrest, the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior, and to assess the effect which transfer will have on the inmate's further incarceration. Indeed, in situations where punitive sanctions other than transfers are imposed, the New York correctional system has established procedures which recognize both the demand of elementary fairness and the suitability of an impartial hearing."

The Vermont District Court in Bowens v. Smith, supra, held that prior to or shortly after the transfer of an inmate to another part of the prison with resulting losses, the transferees must be afforded a hearing that includes:

> ".... [N]otice of the charge against them, a fair and impartial determination (emphasis added)...."
> Page 1346

The First Circuit in Gomes v. Travisono, supra, on remand held that the same type of hearing should be provided regardless of the reason for transfer and stated that:

> "Finally in Gomes we dealt with several other issues. Our order of remand to the district court left to it the fashioning of an impartial tribunal [emphasis added]. Wolff's approval of the Nebraska Prison Adjustment Committee indicates that the Rhode Island Disciplinary Board passes constitutional muster."
> 510 F.2d at 541

In other transfer and involuntary out-of-state incarceration cases the courts held that:

> "A hearing must be held upon the transfer recommendation before an impartial tribunal consisting of three or more persons, at least one of whom is not a prison official. A prison official who has participated in the investigation of the charge or who has been involved in the decision to recommend transfer shall not be a member of the hearing tribunal." Hoitt v. Vitek, supra, 361 F.Supp. at 1253.

> "Decisions of the Committee [Adjustment Committee] .... should be made by an unbiased fact-finder, not involved in any particular incident which constitutes the basis for transfer."
> Ault v. Holmes, supra, at p. 293

These cases are examples of the standards established by the courts concerning the decisionmaker. See also Robbins v. Kleindienst, supra, which applies Wolff v. McDonnell, supra, standards.

4. All prison cases involving due process must be reviewed according to the minimal standards articulated in Wolff v. McDonnell.

In June of 1974 the United States Supreme Court in Wolff v. McDonnell, supra, established the minimal standards under the Due Process Clause for prison disciplinary hearings, and courts have applied these standards to transfer situations.

In discussing the requirement of an impartial hearing officer, the court by implication determined that an impartial determination was necessary to meet the Due Process Requirements:

> "Finally we decline to rule that the Adjustment Committee which conducts the required hearings at the Nebraska Prison Complex and determines whether to revoke good time is not sufficiently impartial to satisfy the Due Process Clause."
> 41 L.Ed.2d 935 at 959

Justice Marshall, who dissented in part, discussed more fully the requirement of the impartial hearing officer:

> "Finally, the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decisionmaker is a fundamental requirement of due process in a variety of relevant situations. See e.g. Morrissey v. Brewer, 408 U.S. at 485 - 486; Goldberg v. Kelly, supra, 397 U.S. at 271 and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board comprised of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on dsiciplinary panels so as to eleminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case....[cases cited] I find it impossible to determine on the present record whether this standard of impartiality has been met, and I would leave this question open for the District Court's consideration on remand." 41 L.Ed.2d at 972

The trial court in the case at bar read Wolff v. McDonnell, supra, to hold that a carefully defined area of discretion can offset some shortcomings in the impartiality of the disciplinary board. (Appendix p. 129) It is contended that reliance on the Supreme Court statement is misplaced in that the court was not referring to pre-established criteria as a method of ascertaining impartiality.

It was found in Wolff v. McDonnell, supra, that a case was referred to the Committee [Disciplinary] after investigation and an initial interview by another officer and that it was the possibility of subsequent deprivations that led the court fo find that the committee did not act with unlimited discretion. In

the case at bar the investigating officer, the charging officer and a person who had familiarity with inmate Carlson sat as the hearing officer. (See Statement of the Facts)

Lower courts, in light of Wolff v. McDonnell, supra, have reviewed the question of the necessity for an impartial hearing officer. In Gomes v. Travisono, supra, where the circuit court initially held that two types of hearings could be held depending on the reasons for transfer at 490 F.2d 1209, the Court on remand in light of Wolff held one hearing should be conducted which included an impartial tribunal.

The Ninth Circuit reviewed its decision in Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974) modified at 410 F.2d 613 (9th Cir. 1975) in light of Wolff v. McDonnell, supra, and affirmed its holding regarding the hearing officer which stated:

> "Basic to an accused prisoner's constitutional guarantee of an accurate and fair fact finding determination prior to imposition of sanctions is the right to be heard by an impartial disciplinary committee..... Nevertheless, provided that no member of the disciplinary committee has participated or will participate in the case as an investigating or reviewing officer or either as a witness or has personal knowledge of material facts related to the involvement of the accused inmate in the specific alleged infraction (or is otherwise personally interested in the outcome of the disciplinary proceeding), a hearing board comprised of prison officials will satisfy the due process requirement of a 'neutral and detached' hearing body."
> 497 F.2d 809, 810 citing Morrissey v. Brewer, supra, at 489; Meyers v. Alldredge (3rd Cir. 1974) 492 F.2d 296 at 305, 306; Landman v. Royster (E.D. Va. 1971) 333 F. Supp. 621, 653.

Other cases that have ruled on these questions include Murphy v. Wheaton, 381 F.Supp. 1252 (N.D. Ill. 1974) where the court, in deciding the merits of a pro se complaint alleging

constitutional deprivation because of segregated confinement, stated:

> "It is well settled that prisoners retain the protections of the Due Process Clause. [Citing Wolff].... The nature of incarceration imposes certain restrictions on the scope of due process protection, however, and the 7th Circuit has held that with respect to disciplinary proceedings, the Constitution requires only advance written notice of the proceeding, a dignified hearing in which the accused may be heard, and an opportunity to request that other witnesses be called or interviewed and an impartial decisionmaker [emphasis added]." at p. 1255 citing Miller v. Twomey, 479 F.2d 701 at 716 (7th Cir. 1973).

In Walker v. Hughes, supra, the punishment of segregated confinement was contested. In discussing the process due the court held in light of Wolff v. McDonnell, supra, that:

> "In Wolff the Court found the composition of the Nebraska Adjustment Committee to be constitutionally permissible, but did not prescribe standards by which courts could evaluate the composition of hearing boards in other cases. And, it must be noted that the chief corrections officer, who investigates complaints and conducts interviews with the accused inmate, was not a member of the committee approved in Wolff. Thus, this court concludes that from the adjustment committee must be excluded any employee who investigated the incident...." p. 41

See also Romero v. Schaeur, supra, and Finney v. Arkansas Board of Corrections, 505 F.2d 194 (5th Cir. 1974) which states:

> "There is evidence that on occasion the same officer who invokes disciplinary measures sits on the committee to review the matter. This practice has been unanimously condemned by those courts which have considered it." 505 F.2d at 308, and cases cited therein

The District Court, at the hearing in the case at bar, found that Warden Moeykens played no significant part in the initial stages other than to report that Carlson had escaped again. (Appendix p. 129) The testimony shows that opposite was the case.

(Statement of Facts). As stated in the statement of the facts in this brief the Warden played an extensive role in all stages of the procedure used in this case. It should be reemphasized that the Warden spent the entire afternoon of March 11, 1974, conducting an investigation into the facts surrounding the escape, and interviewing persons incident to the escape. (Transcript p. 156) He also prepared the notice of transfer.

In conclusion, Appellant states that the facts as testified to clearly demonstrate the high degree of partiality of the hearing officer, to wit Warden Moeykens, who presided at the hearing at which inmate Carlson was to contest his out-of-state incarceration. The use of Warden Moeykens as a hearing officer did deprive inmate Carlson of due process of law.

B. APPELLANT CONTENDS THAT THE TRIAL COURT ERRED IN IN HOLDING THAT APPELLANT WAS NOT DENIED EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN APPELLANT WAS NOT PROVIDED THE OPPORTUNITY FOR AN INDEPENDENT HEARING OFFICER AND LEGAL COUNSEL AT THE HEARING PROVIDED BY APPELLEES TO CONTEST THE OUT-OF-STATE INCARCERATION OF APPELLANT WHICH RESULTED FROM ALLEGED ACTIVITY BY APPELLANT WHICH COULD HAVE BEEN AND WAS THE SUBJECT OF CRIMINAL PROSECUTION IN THE STATE OF VERMONT.

1. Appellant was not permitted representation by legal counsel or an independent hearing officer at his transfer hearing, even though his escape was the subject of impending criminal charges.

Appellant Carlson contends that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that he should have been afforded an impartial hearing officer and the right to legal counsel at the hearing incident to his transfer. Inmate Carlson's and inmate Anthony Tanzi's action and escape triggered different types of procedural process. Inmate Carlson was afforded a "transfer hearing pursuant to Vermont Department of Corrections policy." (Appendix p. 102 - 104) Tanzi was afforded another type of hearing which included legal counsel and an impartial hearing officer. (Appendix p. 82 - 86, Transcript p. 113 - 115) The results of the hearings were that inmate Carlson was involuntarily transferred to the Federal prison system, with its resulting losses, and that Tanzi was locked in his cell for 30 days and was required to start again his treatment program in "A" Block. (Transcript p. 115) The Vermont Department of Corrections has established a written policy at Windsor Prison that at hearings for rules and infractions where the inmate is charged with a violation of prison regulations which has been or may be referred for criminal prosecution, the inmate may be represented by legal counsel, (Appendix p. 84), and an independent hearing officer or impartial tribunal would conduct the hearing. (Appendix p. 83, 84) Inmate Carlson, who was criminally charged for the actions which also constituted the infraction of the prison rule which led to his transfer, received neither an impartial hearing officer nor legal counsel. (Appendix p. 69 - 78).

2. This Court should reject a rigid approach to the "minimum rationality" standard applied in Equal Protection cases, and rather apply a more flexible standard which considers what legitimate or substantial state purpose existed for the discrimination against Appellant.

In the two-tier approach to equal protection the United States Supreme Court has applied, the Court at times has used an extremely rigid approach to non-suspect classification/ non-fundamental right cases. While it has been held that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," McGowan v. Maryland, 366 U.S. 420, 426 (1961); accord Dandridge v. Williams, 397 U.S. 471, 485 (1970), extending such a standard to its logical extreme could, as Justice Marshall noted in his dissent in Dandridge, supra, effectively eliminate all claims in the area of equal protection:

> "The Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects. This is so even though the classification's under inclusiveness or over inclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State, and even though the relationship between that classification and the state interests which it purports to serve is so tenuous that it could not seriously be maintained that the classification tends to accomplish the ascribed goals." Dandridge, supra, at 508 - 509 (Marshall, J., dissenting)

The Court, in several instances, has been unwilling to apply the "minimally rational" standard. Instead, the Justices have focused their inquiry into whether "the challenged distinction

rationally furthers some legitimate, articulated state purpose," see McGinnis v. Royster, 410 U.S. 263, 270, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973), or "whether there is an appropriate governmental interest suitably furthered by the differential treatment," Police Department of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), or whether the statute bears a "fair and substantial relation to the object of the legislation." See F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). The rationale for the search for a more flexible standard has been expressed as follows:

> "An inherent defect in the two-tier model is that it does not cover cases where the individual's interests should be accorded 'intermediate' weight."
> A Question of Balance: Statutory Classifications Under the Equal Protection Clause, 26 Stanford L.Rev. 155, 157 (1973).

Professor Gunther has emphasized the need for a departure from the two-tier approach to equal protection claims and has proposed a "means-focused" model which would require that "legislative means must substantially further legislative ends." See Gunther, The Supreme Court 1971 Term--Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L.Rev. 1, 20 (1972).

This standard seems to have been adopted by some courts in dealing with inmates' rights. In a case concerning censorship of prison inmates' mail, it was held that:

> "[I]t is clear that such rights may be restricted by the state if the state has a legitimate and substantial interest which justifies the infringement of plaintiff individual's rights, and if the state's legitimate goals cannot be achieved by less restrictive alternative means." Marsh v. Moore, 325 F.Supp. 392, 394 (D. Mass. 1971)

Another court has viewed its role as "balanc[ing] the asserted need for the regulation in furthering prison security or orderly administration against the claimed right and the degree to which it has been impaired." Smith v. Robbins, 328 F.Supp. 162, 164 (D. Me. 1971); modified 454 F.2d 696 (1st Cir. 1972); accord, Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972).

It is therefore urged that in viewing Appellant's equal protection argument, this Court should reject a rigid approach to the standard of minimum rationality, and rather should consider what substantial or legitimate state purpose existed for the discrimination against Appellant, particularly in light of the purposes behind the policy which the Department failed to apply to inmate Carlson.

It must be presumed that had inmate Carlson's transfer not occurred, he would have been brought before the prison disciplinary committee, as Tanzi was, and afforded the procedural protection of an impartial hearing board or officer and the right to legal counsel. There certainly can be no doubt that the same escape attempts that triggered the Tanzi disciplinary hearing also triggered the Carlson transfer hearing, for within hours of Carlson's return, he was informed of Warden Moeyken's intent to hold a transfer hearing. (Transcript p. 21) Certainly it makes little difference what label is applied to the type of

hearing, for, as this Court has stated,

> "Classification by label (e.g. as 'administrative' or 'disciplinary') may facilitate prison administration but it cannot be used as a substitute for due process. In our view appellee's position gives insufficient consideration to the very real loss that an inmate may suffer even when his transfer is not part of formal disciplinary proceedings and has no adverse parole consequences...
>
> "[I]t would be something of a paradox if prison authorities could by transferring a prisoner for disciplinary reasons to another institution...deprive him of due process rights to which he would be entitled upon a transfer within the prison itself."
>
> Newkirk v. Butler, 499 F.2d 1214, 1217, 1218 (2nd Cir., 1974); cert. granted, ____ U.S. ____, 42 L.Ed.2d 138, 95 S.Ct. 172 (1974).

Inmate Carlson maintains that his transfer was a result of violation of the Department of Correction's regulations. (Transcript p. 139) It is clear that regardless of the label placed on the hearing he received, procedural benefits afforded Tanzi and other similarly situated inmates were denied inmate Carlson. Neither a substantial nor even a rational basis appears to exist for this difference in treatment, particularly since the purpose of providing the added protections was the commendable concern on the part of the prison officials that, because of the pending or impending criminal charges, the prisoner should receive added protections of legal counsel and an independent hearing officer at the departmental hearing. Thus the reason for providing private legal counsel and an independent hearing officer was to insure that the prisoner's legal rights, particularly those concerning self-incrimination, and right to counsel, would not be abridged, and thus that the criminal proceedings

would not be jeopardized. It is hard to see what legitimate purpose exists for insuring the protection of constitutional rights of one prisoner facing criminal charges and denying such protection to another. Surely the type of departmental hearing involved provides no such purpose.

A fundamental principle derived from the Equal Protection Clause of the Fourteenth Amendment is that the state, having once afforded to its citizens a legal protection through statute or administrative policy, may not then deny that protection to some of those citizens absent a showing of a proper state interest. See Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Appellant still seeks to learn what state interest existed in denying him protections granted to other inmates similarly situated. Lacking such interest, Appellee has denied Appellant Equal Protection of the Law.

3. The rationale for providing counsel at the departmental hearing would be to protect the rights of the inmate, not to advance the interests of the state.

The trial court in this case found that the presence of counsel for the inmate at a disciplinary hearing likely to result in criminal charges is principally for the benefit of the state and not for the prisoner. (Appendix p. 147) Another approach to the question of legal counsel at hearings is that followed in Clutchette, v. Procunier, 328 F.Supp. 767 (N.D. Cal. 1974) modified 497 F.2d 809 (9th Cir. 1974) further

modified in light of Wolff v. McDonnell, supra, 510 F.2d 613 (9th Cir. 1974) The Circuit court, when this case was first before it, held that when a prisoner was required to appear before a prison disciplinary committee for violation of prison rules which may also be punishable by state authorities, he must be afforded legal counsel. 497 F.2d 809, 823 The rationale used was that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 12 L.Ed.2d 694 (1966), mandated the right to counsel because what was taking place was interrogation of an incarcerated suspect. "... [I]f the Disciplinary Committee directed questions at the accused inmate he would be subject to 'custodial interrogation' and would have a Fifth Amendment right to remain silent and a right to be represented by counsel (retained or appointed) while subjected to such questioning." 12 L.Ed.2d at 823.

The Court went on to state that providing Miranda warnings was not sufficient.

In light of Wolff the Court retained its requirement at these hearings. 510 F.2d 613 at 616. The First Circuit has also ruled on the question of legal counsel where future prosecution is contemplated. The Court in Palmigiano v. Baxter, 487 F.2d 1280 (1st. Cir. 1973) vacated and remanded 418 U.S. 908, 94 S.Ct. 3200, 41 L.Ed.2d 1155 (1974) for reconsideration of its decision in light of Wolff v. McDonnell, supra, 510 F.2d 534 (1st. Cir. 1974), held that "moreover in cases where criminal charges are a realistic possibility, prison authorities

should consider whether defense counsel, if requested, should not be let into disciplinary proceedings. Not because Wolff requires that at that proceeding but because Miranda requires in light of future criminal prosecutions." 510 F.2d 534, 537.

Using the trial court's approach, the inmate who recognizes the potential liability of statements is harmed because he declines to represent himself or say anything on his behalf at the disciplinary proceeding.

V. CONCLUSION

For the foregoing reasons, the Court should hold that Appellant was denied Due Process of Law and Equal Protection of Law at his transfer hearing, reverse the District Court's holding, and order such other relief as the Court deems appropriate.

DATED at Montpelier, Vermont, this 20th day of June, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 20th day of June, 1975, I served two copies of the foregoing Brief of the Plaintiff-Appellant and one copy of the accompanying Appendix upon the Defendants-Appellees by placing same in the United States mail, first class, postage prepaid addressed to Alan W. Cook, Esq. and Robert L. Orleck, Esq., Assistant Attorneys General, Department of Corrections, Heritage II, 79 River Street, Montpelier, VT 05602.

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